## Utah Code (2008)

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### Title 63A. Utah Administrative Services Code.

## Chapter 2. Division of Purchasing and General Services.

#### Part 1. General Provisions.

#### 63A-2-101. Creation.

There is created the Division of Purchasing and General Services within the Department of Administrative Services.

Amended by Chapter 252, 1997 General Session

### 63A-2-102. Director of division -- Appointment.

- (1) The executive director of the department shall appoint the director of the Division of Purchasing and General Services with the approval of the governor.
- (2) The director of the Division of Purchasing and General Services is also the state's chief procurement officer.

Amended by Chapter 252, 1997 General Session

# 63A-2-103. General services provided -- Subscription by state departments, state agencies, and certain local governmental entities -- Fee schedule.

- (1) (a) The director of the Division of Purchasing and General Services shall operate, manage, and maintain:
  - (i) a central mailing service; and
  - (ii) an electronic central store system for procuring goods and services.
  - (b) The director may establish microfilming, duplicating, printing, addressograph, and other central services.
- (2) (a) Each state department and agency shall subscribe to all of the services described in Subsection (1), unless the director delegates the director's authority to a department or agency under Section 63A-2-104.
  - (b) An institution of higher education, school district, or political subdivision of the state may subscribe to one or more of the services described in Subsection (1).
  - (3) The director shall:
  - (a) prescribe a schedule of fees to be charged for all services provided by the division to any department or agency after the director:
    - (i) submits the proposed rate, fees, or other amounts for services provided by the division's internal service fund to the Rate Committee established in Section 63A-1-114; and
    - (ii) obtains the approval of the Legislature, as required by Sections 63J-1-303 and 63J-1-306;

- (b) when practicable, ensure that the fees are approximately equal to the cost of providing the services; and
- (c) conduct a market analysis by July 1, 2005, and periodically thereafter of fees, which analysis shall include comparison of the division's rates with the fees of other public or private sector providers where comparable services and rates are reasonably available.

Amended by Chapter 382, 2008 General Session

## 63A-2-104. Delegation of general services to departments or agencies -- Writing required -- Contents -- Termination.

- (1) The director of the Division of Purchasing and General Services, with the approval of the executive director, may delegate, in writing, his authority to perform or control any general services function to other state agencies and institutions by contract or other means authorized by law, if:
  - (a) in the judgment of the executive director, the state department or agency has requested the authority; and
  - (b) the state department or agency has the necessary resources and skills to perform or control the functions.
- (2) The director may delegate his authority only when the delegation would result in net cost savings or improved service delivery to the state as a whole.
- (3) The written delegation shall contain the following:
  - (a) a precise definition of each function to be delegated;
  - (b) a clear description of the standards to be met in performing each function delegated;
  - (c) a provision for periodic administrative audits by the department; and
  - (d) a date on which the agreement shall terminate if not previously terminated or renewed.
- (4) An agreement to delegate functions to a state agency or institution may be terminated by the department if the results of administrative audits conducted by the department reveal lack of compliance with the terms of the agreement.

  Amended by Chapter 252, 1997 General Session

### 63A-2-105. Director to approve certain purchases.

- (1) Each agency that intends to purchase any mail-related equipment or copy machine shall submit a purchase request to the director of the Division of General Services.
- (2) The director shall review those requests to ensure that:

- (a) the authority to perform those functions has been appropriately delegated to the agency under this part;
- (b) the equipment meets proper specifications; and
- (c) the benefits from the agency's purchase of the equipment outweigh the benefits of having the same functions performed by the Division of Purchasing and General Services.

Amended by Chapter 252, 1997 General Session

## Title 63G. General Government

## Chapter 6. Utah Procurement Code.

#### Part 1. General Provisions.

#### 63G-6-101. Title.

This chapter is known as the "Utah Procurement Code."

Enacted by Chapter 382, 2008 General Session

#### 63G-6-102. Purpose of chapter.

The underlying purposes and policies of this chapter are:

- (1) to simplify, clarify, and modernize the law governing procurement by this state;
- (2) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this state;
- (3) to provide increased economy in state procurement activities; and
- (4) to foster effective broad-based competition within the free enterprise system.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-103. Definitions.

As used in this chapter:

- (1) "Architect-engineer services" are those professional services within the scope of the practice of architecture as defined in Section 58-3a-102, or professional engineering as defined in Section 58-22-102.
- (2) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (3) "Change order" means a written order signed by the procurement officer, directing the contractor to

suspend work or make changes, which the appropriate clauses of the contract authorize the procurement officer to order without the consent of the contractor or any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

- (4) (a) "Construction" means the process of building, renovation, alteration, improvement, or repair of any public building or public work.
  - (b) "Construction" does not mean the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.
- (5) (a) "Construction Manager/General Contractor" means any contractor who enters into a contract for the management of a construction project when that contract allows the contractor to subcontract for additional labor and materials that were not included in the contractor's cost proposal submitted at the time of the procurement of the Construction Manager/General Contractor's services.
  - (b) "Construction Manager/General Contractor" does not mean a contractor whose only subcontract work not included in the contractor's cost proposal submitted as part of the procurement of construction is to meet subcontracted portions of change orders approved within the scope of the project.
- (6) "Contract" means any state agreement for the procurement or disposal of supplies, services, or construction.
- (7) "Cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement unit.
- (8) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowed and allocated in accordance with the contract terms and the provisions of this chapter, and a fee, if any.
- (9) (a) "Design-build" means the procurement of architect-engineer services and construction by the use of a single contract with the design-build provider.
  - (b) This method of design and construction can include the design-build provider supplying the site as part of the contract.
- (10) "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:
  - (a) is regularly maintained by a manufacturer or contractor;
  - (b) is either published or otherwise available for inspection by customers; and

- (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
- (11) "External procurement unit" means any buying organization not located in this state which, if located in this state, would qualify as a public procurement unit. An agency of the United States is an external procurement unit.
- (12) "Grant" means the furnishing by the state or by any other public or private source assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction. A contract resulting from the award is not a grant but a procurement contract.
- (13) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (14) "Local public procurement unit" means any political subdivision or institution of higher education of the state or public agency of any subdivision, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, but not counties, municipalities, political subdivisions created by counties or municipalities under the Interlocal Cooperation Act, the Utah Housing Corporation, or the Legislature and its staff offices. It includes two or more local public procurement units acting under legislation which authorizes intergovernmental cooperation.
- (15) "Person" means any business, individual, union, committee, club, other organization, or group of individuals, not including a state agency or a local public procurement unit.
- (16) "Policy board" means the procurement policy board created by Section 63G-6-201.
- (17) "Preferred bidder" means a bidder that is entitled to receive a reciprocal preference under the requirements of this chapter.
- (18) "Procurement" means buying, purchasing, renting, leasing, leasing with an option to purchase, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation, and award of a contract, and all phases of contract administration.
- (19) "Procurement officer" means any person or board duly authorized to enter into and administer

contracts and make written determinations with respect thereto. It also includes an authorized representative acting within the limits of authority.

- (20) "Public procurement unit" means either a local public procurement unit or a state public procurement unit.
- (21) "Purchase description" means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to or made a part of the solicitation.
- (22) "Purchasing agency" means any state agency other than the Division of Purchasing and General Services that is authorized by this chapter or its implementing regulations, or by delegation from the chief procurement officer, to enter into contracts.
- (23) "Request for proposals" means all documents, whether attached or incorporated by reference, used for soliciting proposals.
- (24) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and who has the integrity and reliability which will assure good faith performance.
- (25) "Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids.
- (26) "Sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals manually sealed and submitted.
- (27) "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. It does not include employment agreements or collective bargaining agreements.
- (28) "Specification" means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.
- (29) "State agency" or "the state" means any department, division, commission, council, board, bureau, committee, institution, government corporation, or other establishment, official, or employee of this state.
- (30) "State public procurement unit" means the Division of Purchasing and General Services and any other purchasing agency of this state.
- (31) "Supplies" means all property, including equipment, materials, and printing.
- (32) "Using agency" means any state agency which utilizes any supplies, services, or construction procured under this chapter.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-104. Application of chapter.

- (1) This chapter applies only to contracts solicited or entered into after the effective date of this chapter unless the parties agree to its application to a contract solicited or entered into prior to the effective date.
- (2) Except as provided in Section 63G-6-105, this chapter shall apply to every expenditure of public funds irrespective of their source, including federal assistance, by any state agency under any contract.
- (3) (a) Only the following sections shall apply to local public procurement units: Sections 63G-6-103, 63G-6-105, 63G-6-301, 63G-6-303 through 63G-6-420, 63G-6-422, 63G-6-501 through 63G-6-602, 63G-6-801 through 63G-6-806, and 63G-6-815 through 63G-6-819; provided, however, that, except as provided in Sections 63G-6-906 and 63G-6-907, the jurisdiction of the procurement appeals board is limited to matters involving state agencies.
  - (b) Subsections 63G-6-208(1)(b), 63G-6-504(4), and 63G-6-505(2) also apply to local public procurement units.
  - (c) For the purpose of application of those sections and subsections to a local public procurement unit, "state" shall mean "local public procurement unit," "chief procurement officer" or "head of a purchasing agency" shall mean any person conducting procurement for a local public procurement unit, and "rules and regulations" shall mean ordinances and rules and regulations promulgated by a local public procurement unit to implement or supplement those sections.
  - (d) In addition to the sections and subsections listed above and except as provided in Subsection 17B-1-108(3) relating to local districts, each local public procurement unit shall adopt ordinances relating to the procurement of architect-engineer services not inconsistent with the provisions of Part 7, Architect-Engineer Services.
  - (e) Any other section of this chapter, or its implementing regulations, may be adopted by any local public procurement unit.
  - (f) Any other implementing regulations adopted by local public procurement units may not be inconsistent with the provisions of this chapter.
- (4) Unless otherwise provided by statute, this chapter does not apply to procurement of real property.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-105. Exemptions from chapter -- Compliance with federal law.

- (1) This chapter is not applicable to funds administered under the Percent-for-Art Program of the Utah Percent-for-Art Act.
- (2) This chapter is not applicable to grants awarded by the state or contracts between the state and local public procurement units except as provided in Part 9, Intergovernmental Relations.
- (3) This chapter shall not prevent the state or a local public procurement unit from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.
- (4) When a procurement involves the expenditure of federal assistance or contract funds, the chief procurement officer or head of a purchasing agency shall comply with mandatory applicable federal law and regulations not reflected in this chapter.
- (5) This chapter may not supersede the requirements for retention or withholding of construction proceeds and release of construction proceeds as provided in Section 13-8-5.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-106. Records.

- (1) All procurement records shall be retained and disposed of in accordance with Title 63G, Chapter 2, Government Records Access and Management Act.
- (2) Written determinations required by this chapter shall also be retained in the appropriate official contract file of the Division of Purchasing and General Services or the purchasing agency.

  Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 2. Procurement Organization.

### 63G-6-201. Creation of procurement policy board.

- (1) (a) There is created a state procurement policy board.
  - (b) The policy board shall consist of eight members who shall be appointed as follows:
    - (i) an employee of a state institution of higher education, appointed by the board of regents;
    - (ii) an employee of the Department of Human Services, appointed by the executive director of that department;
    - (iii) an employee of the Department of Transportation, appointed by the executive director of that department;
    - (iv) an employee of a school district appointed by a cooperative purchasing entity for school districts;

- (v) an employee of the Division of Facilities Construction and Management appointed by the director of that division;
- (vi) an employee of a county, appointed by the Utah Association of Counties:
- (vii) an employee of a city, appointed by the Utah League of Cities and Towns; and
- (viii) an employee of a local district or special service district, appointed by the Utah Association of Special Districts.
- (c) Members of the policy board shall be knowledgeable and experienced in, and have supervisory responsibility for, procurement in their official positions.
- (2) Members shall be appointed to four-year staggered terms.
- (3) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
  - (4) (a) The policy board shall:
    - (i) adopt rules of procedure for conducting its business; and
      - (ii) elect a chair to serve for one year.
  - (b) The chair may be elected to succeeding terms.
  - (c) The chief procurement officer shall serve as the nonvoting secretary to the policy board.
- (5) (a) (i) Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
  - (ii) Members may decline to receive per diem and expenses for their service.
  - (b) (i) State government officer and employee members who do not receive salary, per diem, or expenses from their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the board at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
    - (ii) State government officer and employee members may decline to receive per diem and expenses for their service.
  - (c) (i) Higher education members who do not receive salary, per diem, or expenses from the entity that they represent for their service may receive per diem and expenses incurred in the performance of their official duties from the committee at the rates established by the

Division of Finance under Sections 63A-3-106 and 63A-3-107.

- (ii) Higher education members may decline to receive per diem and expenses for their service.
- (d) (i) Local government members who do not receive salary, per diem, or expenses from the entity that they represent for their service may receive per diem and expenses incurred in the performance of their official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
  - (ii) Local government members may decline to receive per diem and expenses for their service.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-202. Powers and duties of board.

- (1) Except as otherwise provided in Sections 63G-6-104 and 63G-6-208, the policy board shall:
  - (a) make rules, consistent with this chapter, governing the procurement, management, and control of any and all supplies, services, and construction to be procured by the state; and
  - (b) consider and decide matters of policy within the provisions of this chapter, including those referred to it by the chief procurement officer.
  - (2) (a) The policy board may:
    - (i) audit and monitor the implementation of its rules and the requirements of this chapter;
    - (ii) upon the request of a local public procurement unit, review that procurement unit's proposed rules to ensure that they are not inconsistent with the provisions of this chapter; and
    - (iii) approve the use of innovative procurement methods proposed by local public procurement units.
  - (b) The policy board may not exercise authority over the award or administration of:
    - (i) any particular contact; or
    - (ii) over any dispute, claim, or litigation pertaining to any particular contract.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-203. Chief procurement officer -- Appointment -- Qualifications.

- (1) The executive director of the Department of Administrative Services, with the consent of the governor, shall appoint the chief procurement officer after considering recommendations from the policy board.
  - (2) The chief procurement officer shall:

- (a) have a minimum of eight years' experience in the large-scale procurement of supplies and services or services and construction, at least five years of which shall have been in public or comparable private procurement within 12 years preceding the date of appointment; and
- (b) be a person with demonstrated executive and organizational ability.
- (3) The chief procurement officer is also the director of the Division of Purchasing and General Services.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-204. Duties of chief procurement officer

Except as otherwise specifically provided in this chapter, the chief procurement officer serves as the central procurement officer of the state and shall:

- (1) adopt office policies governing the internal functions of the Division of Purchasing and General Services:
- (2) procure or supervise the procurement of all supplies, services, and construction needed by the state:
- (3) exercise general supervision and control over all inventories or supplies belonging to the state;
- (4) establish and maintain programs for the inspection, testing, and acceptance of supplies, services, and construction;
- (5) prepare statistical data concerning the procurement and usage of all supplies, services, and construction;
- (6) before June 1, 1990, notify all public procurement units of the requirements of Section 63G-6-406 regarding purchases of recycled paper and recycled paper products, recycling requirements, and provide guidelines on the availability of recycled paper and paper products, including the sources of supply and the potential uses of various grades of recycled paper;
  - (7) before July 1, 1992:
  - (a) establish standards and specifications for determining which supplies are considered recycled, based upon the chief procurement officer's review of current definitions and standards employed by national procurement, product recycling, and other relevant organizations and the federal Environmental Protection Agency;
  - (b) compile and update as necessary the specifications, a list of recycled supplies available on state contract, and sources where the supplies may be obtained;
  - (c) make the compiled information under Subsection (7)(b) available to:

- (i) all local government entities under Section 11-37-101;
- (ii) all local health departments under Section 26A-1-108.7;
- (iii) all procurement officers or other persons responsible for purchasing supplies within the public school system under Title 53A, State System of Public Education;
- (iv) all procurement officers or other persons responsible for purchasing supplies within the state system of higher education under Title 53B, State System of Higher Education; and
- (v) all procurement officers or other persons responsible for purchasing supplies for all public procurement units as defined in Section 63G-6-103; and
- (d) present a written report to the Natural Resources, Agriculture, and Environment Interim Committee annually prior to November 30 regarding the purchases of recycled goods on state contracts during the prior fiscal year; and (8) ensure that:
- (a) before approving a purchase, lease, or rental not covered by an existing statewide contract for information technology or telecommunications supplies or services, the chief information officer and the agency have provided in writing to the division, that the needs analysis required in Section 63F-1-205 was completed, unless the purchase, lease, or rental is approved in accordance with Title 63M, Chapter 1, Part 26, Government Procurement Private Proposal Program; and
- (b) the oversight authority required by Subsection (8)(a) is not delegated outside the Division of Purchasing and General Services.

Amended by Chapter 352, 2008 General Session; and Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-205. Delegation of authority.

Subject to rules and regulations, the chief procurement officer may delegate authority to designees or to any department, agency, or official. For a procurement process under Title 63M, Chapter 1, Part 26, Government Procurement Private Proposal Program, any delegation by the chief procurement officer under this section shall be made to the Governor's Office of Economic Development.

Amended by Chapter 352, 2008 General Session; and Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-206. Transfer of power to policy board.

Except as otherwise provided in this chapter, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, and sale

of supplies, services, and construction vested in or exercised by any state agency on the effective date are transferred to the policy board as they relate to its duties and to the Division of Purchasing and General Services as they relate to its duties.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-207. Specific statutory authority.

- (1) The authority to procure certain supplies, services, and construction given the public procurement units governed by the following provisions shall be retained:
  - (a) Title 53B, State System of Higher Education;
  - (b) Title 63A, Chapter 5, State Building Board - Division of Facilities Construction and Management;
    - (c) Title 67, Chapter 5, Attorney General;
    - (d) Title 72, Transportation; and
    - (e) Title 78A, Chapter 5, District Courts.
- (2) This authority extends only to supplies, services, and construction to the extent provided in the cited chapters. Except as otherwise provided in Sections 63G-6-104 and 63G-6-105, the respective purchasing agencies shall procure supplies, services, and construction in accordance with this chapter.
- (3) (a) The Department of Transportation may make rules governing the procurement of highway construction or improvement.
  - (b) This Subsection (3) supersedes Subsections (1) and (2).
- (4) The Legislature may procure supplies and services for its own needs.

Amended by Chapter 3, 2008 General Session; and Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-208. Rules and regulations of policy board and building board.

- (1) (a) Except as provided in Subsection (2), the policy board shall make rules governing state procurement by complying with the procedures and requirements of Title 63G, Chapter 3, the Utah Administrative Rulemaking Act.
  - (b) The procurement rules adopted by the policy board under this section apply to all local public procurement units unless the local public procurement unit's legislative body has adopted separate rules governing procurement.
- (2) The State Building Board rules governing procurement of construction, architect-engineer services, and leases apply to the procurement of construction, architect-engineer services, and leases of real property by the Division of Facilities Construction and Management.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-209. Procurement Advisory Council.

- (1) The policy board may establish a Procurement Advisory Council, which shall meet at least once a year for the discussion of problems and recommendations for improvement of the procurement process. When requested by the policy board, the Procurement Advisory Council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the jurisdiction of the policy board. The Procurement Advisory Council shall consist of representatives of state and local government and any other persons the policy board considers desirable.
- (2) The chief procurement officer may appoint advisory groups to provide advice regarding any matters within the authority of the chief procurement officer.
- (3) Members of the Procurement Advisory Council and other advisory groups may be reimbursed for expenses incurred in the performance of their duties, as provided by the policy board. Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 3. Specifications.

### 63G-6-301. Rules and regulations for specifications of supplies.

Rules and regulations shall be promulgated to govern the preparation, maintenance, and content of specifications for supplies, services, and construction required by the state. Rules and regulations shall determine the extent to which a nonemployee who has prepared specifications for use by the state may participate in any state procurement using such specifications.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-302. Duty of chief procurement officer in maintaining specifications of supplies.

The chief procurement officer shall prepare, issue, revise, maintain, and monitor the use of specifications for supplies, services, and construction required by the state. The chief procurement officer shall obtain expert advice and assistance from personnel of using agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications. For a procurement process under Title 63M, Chapter 1, Part 26, Government Procurement Private Proposal Program, any delegation by the chief procurement officer under this section shall be made to the Governor's Office of Economic Development.

Amended by Chapter 352, 2008 General Session; and Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-303. Purpose of specifications.

All specifications shall seek to promote overall economy and best use for the purposes intended and encourage competition in satisfying the state's needs, and shall not be unduly restrictive. The requirements of this part regarding the purposes and nonrestrictiveness of specifications shall apply to all specifications, including, but not limited to, those prepared by architects, engineers, designers, and draftsmen for public contracts.

Renumbered and Amended by Chapter 382, 2008 General Session

### Part 4. Source Selections and Contract Formation.

### 63G-6-401. Contracts awarded by sealed bidding -- Procedure.

- (1) Contracts shall be awarded by competitive sealed bidding except as otherwise provided by this chapter.
- (2) (a) An invitation for bids shall be issued when a contract is to be awarded by competitive sealed bidding.
  - (b) The invitation shall include a purchase description and all contractual terms and conditions applicable to the procurement.
- (3) (a) Public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids, in accordance with rules.
  - (b) The notice may include publication in a newspaper of general circulation a reasonable time before bid opening.
- (4) (a) Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids.
  - (b) The amount of each bid and any other relevant information specified by rules, together with the name of each bidder, shall be recorded.
  - (c) The record and each bid shall be open to public inspection.
- (5) (a) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter.
  - (b) (i) Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose.
    - (ii) Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable.
    - (iii) The criteria may include discounts, transportation costs, and total or life cycle costs.

- (c) No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- (6) (a) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on the bid mistakes, shall be permitted in accordance with rules.
  - (b) After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may be permitted.
  - (c) Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes shall be supported by a written determination made by the chief procurement officer or the head of a purchasing agency.
- (7) (a) The contract shall be awarded with reasonable promptness by written notice to the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
  - (b) (i) If all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed those funds by more than 5%, the chief procurement officer or the head of a purchasing agency may, in situations where time or economic considerations preclude resolicitation of work of a reduced scope, negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder in order to bring the bid within the amount of available funds.
    - (ii) If the State Building Board establishes alternative procedures by rule under Section 63A-5-103, the Division of Facilities Construction and Management need not comply with the provisions of this Subsection (7) when a bid meets the requirements of the State Building Board's rule.
- (8) When it is considered impractical to prepare initially a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

### 63G-6-402. Contracts awarded by reverse auction.

(1) As used in this section, "reverse auction" means a process where:

- (a) contracts are awarded in an open and interactive environment, which may include the use of electronic media; and
- (b) bids are opened and made public immediately, and bidders given opportunity to submit revised, lower bids, until the bidding process is complete.
- (2) (a) Notwithstanding the requirements of this chapter, contracts may be awarded through a reverse auction.
  - (b) The policy board shall make rules, consistent with this chapter, governing a reverse auction process.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-403. Procurement -- Use of recycled goods.

The procurement officer or other person responsible for purchasing supplies for each public procurement unit shall:

- (1) comply with Section 63G-6-406; and
- (2) (a) maintain for reference a copy of the current listing of recycled items available on state contract as issued by the chief procurement officer under Section 63G-6-204; and
  - (b) give recycled items consideration when inviting bids and purchasing supplies.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-404. Preference for providers of state products.

- (1) (a) All public procurement units shall, in all purchases of goods, supplies, equipment, materials, and printing, give a reciprocal preference to those bidders offering goods, supplies, equipment, materials, or printing produced, manufactured, mined, grown, or performed in Utah as against those bidders offering goods, supplies, equipment, materials, or printing produced, manufactured, mined, grown, or performed in any state that gives or requires a preference to goods, supplies, equipment, materials, or printing produced, manufactured, mined, grown, or performed in that state.
  - (b) The amount of reciprocal preference shall be equal to the amount of the preference applied by the other state for that particular good, supply, equipment, material, or printing.
  - (c) (i) The bidder shall certify on the bid that the goods, supplies, equipment, materials, or printing offered are produced, manufactured, mined, grown, or performed in Utah.
    - (ii) The reciprocal preference is waived if that certification does not appear on the bid
- (2) (a) If the bidder submitting the lowest responsive and responsible bid offers goods, supplies,

equipment, materials, or printing produced, manufactured, mined, grown, or performed in a state that gives or requires a preference, and if another bidder has submitted a responsive and responsible bid offering goods, supplies, equipment, materials, or printing produced, manufactured, mined, grown, or performed in Utah, and with the benefit of the reciprocal preference, his bid is equal to or less than the original lowest bid, the procurement officer shall:

- (i) give notice to the bidder offering goods, supplies, equipment, materials, or printing produced, manufactured, mined, grown, or performed in Utah that the bidder qualifies as a preferred bidder; and
- (ii) make the purchase from the preferred bidder if, the bidder agrees, in writing, to meet the low bid within 72 hours after notification that the bidder is a preferred bidder.
- (b) The procurement officer shall include the exact price submitted by the lowest bidder in the notice the procurement officer submits to the preferred bidder.
- (c) The procurement officer may not enter into a contract with any other bidder for the purchase until 72 hours have elapsed after notification to the preferred bidder.
- (3) (a) If there is more than one preferred bidder, the procurement officer shall award the contract to the willing preferred bidder who was the lowest preferred bidder originally.
  - (b) If there were two or more equally low preferred bidders, the procurement officer shall comply with the rules adopted by the Procurement Policy Board to determine which bidder should be awarded the contract.
- (4) The provisions of this section do not apply if application of this section might jeopardize the receipt of federal funds.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-405. Preference for resident contractors.

- (1) As used in this section, "resident contractor" means a person, partnership, corporation, or other business entity that:
  - (a) either has its principal place of business in Utah or that employs workers who are residents of this state when available; and
  - (b) was transacting business on the date when bids for the public contract were first solicited.
- (2) (a) When awarding contracts for construction, a public procurement unit shall grant a resident contractor a reciprocal preference as against

- a nonresident contractor from any state that gives or requires a preference to contractors from that state.
  - (b) The amount of the reciprocal preference shall be equal to the amount of the preference applied by the state of the nonresident contractor.
- (3) (a) The bidder shall certify on the bid that the bidder qualifies as a resident contractor.
  - (b) The reciprocal preference is waived if that certification does not appear on the bid.
- (4) (a) If the contractor submitting the lowest responsive and responsible bid is not a resident contractor and has his principal place of business in any state that gives or requires a preference to contractors from that state, and if a resident contractor has also submitted a responsive and responsible bid, and, with the benefit of the reciprocal preference, the resident contractor's bid is equal to or less than the original lowest bid, the procurement officer shall:
  - (i) give notice to the resident contractor that the resident contractor qualifies as a preferred resident contractor; and
  - (ii) issue the contract to the resident contractor if the resident contractor agrees, in writing, to meet the low bid within 72 hours after notification that the resident contractor is a preferred resident contractor.
  - (b) The procurement officer shall include the exact price submitted by the lowest bidder in the notice the procurement officer submits to the preferred resident contractor.
  - (c) The procurement officer may not enter into a contract with any other bidder for the construction until 72 hours have elapsed after notification to the preferred resident contractor.
- (5) (a) If there is more than one preferred resident contractor, the procurement officer shall award the contract to the willing preferred resident contractor who was the lowest preferred resident contractor originally.
  - (b) If there were two or more equally low preferred resident contractors, the procurement officer shall comply with the rules adopted by the Procurement Policy Board to determine which bidder should be awarded the contract.
- (6) The provisions of this section do not apply if application of this section might jeopardize the receipt of federal funds.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-406. Preference for recycled paper and paper products.

- (1) As used in this section:
- (a) "Chief procurement officer" is the chief procurement officer appointed under Section 63G-6-203.

- (b) "Paper" means any newspaper, highgrade office paper, fine paper, bond paper, offset paper, xerographic paper, mimeographic paper, duplicator paper, and related types of cellulosic material containing not more than 10% by weight or volume of noncellulosic material such as laminates, binders, coatings, or saturants.
- (c) "Paper product" means any paper items or commodities, including paper napkins, towels, corrugated and other cardboard, toilet tissue, paper and related types of cellulosic products containing not more than 10% by weight or volume of noncellulosic material such as laminates, binders, coatings, or saturants. "Paper product" does not include preprinted cellulosic products such as books, newspapers, calendars, and magazines.
- (d) "Postconsumer waste," "recycled paper," "recycled paper product," and "secondary waste paper material" are defined by rule made by the Division of Purchasing, Department of Administrative Services. The division rules shall be based on current definitions and standards employed by national procurement, product recycling, and other relevant organizations such as the federal Environmental Protection Agency.
- (2) Notwithstanding Section 63G-6-401, which requires public procurement units to purchase products from the lowest responsible bidder, and subject to Subsection (3), every public procurement unit shall give preference to the purchase of paper and paper products which are manufactured or produced from recycled materials.
- (3) A public procurement unit shall give preference to purchasing recycled paper and recycled paper products unless:
  - (a) the bid or purchase price for recycled paper or paper products exceeds by more than 5% the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids;
  - (b) there is no recycled paper or paper product reasonably available that meets the requirements and criteria set forth in the invitation for bids; or
  - (c) the public procurement unit has purchased at least the minimum percentage purchase requirement of recycled paper or recycled paper products as provided in Subsection (4).
- (4) (a) The minimum percentage purchase requirement for fiscal year 1990-91 is 10% of the public procurement unit's projected annual paper and paper product purchases.
  - (b) The minimum percentage purchase requirement shall be increased by 5% each fiscal

- year until the minimum percentage purchase requirement is 50%.
- (5) Each public procurement unit shall provide the chief procurement officer with a report at the end of each fiscal year documenting:
  - (a) the dollar amounts of paper and paper products purchased;
  - (b) the dollar amounts of recycled paper and recycled paper products purchased; and
  - (c) any additional costs resulting from purchasing recycled paper or recycled paper products.
- (6) The chief procurement officer shall provide a written report of the information received under Subsection (5) to the Natural Resources, Agriculture, and Environment Interim Committee prior to November 30 of each year.
- (7) (a) Each state agency shall separate and collect all types of recyclable paper for recycling, except under Subsection (7)(b). The chief procurement officer shall maintain an updated list of which papers are recyclable.
  - (b) If the state agency conducts an evaluation under Subsection (8) and determines the cost of recycling a certain type of recyclable paper is more than 10% greater than the cost of the current disposal method, the entity is exempt from the requirements of Subsection (7)(a) regarding that type of paper.
  - (8) A state agency's evaluation shall:
  - (a) determine the types and quantities of recyclable paper in the state agency's current waste stream;
  - (b) determine the market value of the recyclable paper;
  - (c) determine and describe the alternatives for separating recyclable paper from the waste stream;
  - (d) for each type of paper and for each method of separation, determine the cost of separating and collecting the recyclable paper for recycling;
  - (e) determine the cost of the current disposal method for each type of recyclable paper;
  - (f) for each type of paper, compare the cost of the current disposal method with the cost of separating and collecting the paper for recycling; and
  - (g) determine the cost of producing the report required under Subsection (13)(b).
- (9) Each evaluation conducted under Subsection (8) shall:
  - (a) be in writing;
  - (b) justify all estimates;
  - (c) be retained by the state agency;

- (d) be accessible to the public for review; and
- (e) be submitted to the chief procurement officer.
- (10) Each state agency conducting an evaluation shall revise the evaluation as necessary, at least every 30 months.
- (11) A state agency that is required to separate paper for recycling shall:
  - (a) designate an existing employee as a recycling coordinator to organize and coordinate the state agency's recycling program;
  - (b) establish procedures for separating each type of paper required to be separated for recycling;
  - (c) establish a system for separating and collecting each type of paper to be recycled, which assures the recyclable paper is sold to appropriate industries for reuse or recycling; and
  - (d) make participation in the recycling program as easy as practicable for state agency personnel by establishing clear policies.
- (12) The monies received from the sale of recyclable paper shall be retained by the agency for:
  - (a) reimbursement to the state agency for program administration costs incurred as a result of recycling, if any; and
    - (b) funding recycling incentives programs.
- (13) (a) The recycling coordinator designated in Subsection (11) shall keep records of:
  - (i) the quantity of paper recycled by the state agency;
  - (ii) the costs incurred by the state agency in recycling paper; and
  - (iii) the monies received from the sale of recyclable paper.
  - (b) Each recycling coordinator shall provide a written report of the state agency's recycling activities including the information required under Subsection (13)(a) before September 30 of each year to the chief procurement officer.
- (14) The chief procurement officer shall provide a written report of the information received under Subsection (13) to the Natural Resources, Agriculture, and Environment Interim Committee prior to November 30 of each year.

#### 63G-6-407. Use of alkaline paper.

(1) As used in this section, "alkaline paper" means paper that is acid-free, manufactured with calcium carbonate as the principal filler, and meets standards for paper approved by the American National Standards Institute, National Information Standards Organization, and American Society for Testing and Materials.

- (2) (a) Notwithstanding Section 63G-6-401, which requires public procurement units to purchase products from the lowest responsible bidder, and except as provided in Subsection (2)(b), every public procurement unit shall purchase and use alkaline paper.
  - (b) A public procurement unit shall purchase alkaline paper unless:
    - (i) the bid or purchase price for alkaline paper or alkaline recycled paper exceeds the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids;
    - (ii) there is no alkaline or alkaline recycled paper reasonably available that meets the requirements and criteria set forth in the invitation for bids; or
    - (iii) other paper products have equal or better quality characteristics than alkaline paper and meet standards for paper approved by the American National Standards Institute, National Information Standards Organization, and American Society for Testing and Materials.
- (3) The state archivist shall promote the use of alkaline paper within state government, local units of government, and school districts.

Renumbered and Amended by Chapter 382, 2008 General Session

## 63G-6-408. Use of competitive sealed proposals in lieu of bids -- Procedure.

- (1) (a) When, according to rules established by the Procurement Policy Board, the chief procurement officer, the head of a purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals.
  - (b) (i) Competitive sealed proposals may be used for the procurement of services of consultants, professionals, and providers as defined by the policy board by rule, whether or not the determination described in this subsection has been made.
    - (ii) The policy board shall make rules establishing guidelines to assure maximum practicable competition in those procurements, including the relative importance, if any, of the fee to be charged by an offeror.
    - (iii) The rules may provide that it is either not practicable or not advantageous to the state to procure certain types of supplies, services, or construction by competitive

- sealed bidding or competitive sealed proposals.
- (2) (a) Proposals shall be solicited through a request for proposals.
  - (b) Public notice of the request for proposals shall be given in accordance with policy board rules.
- (3) (a) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.
  - (b) A register of proposals shall be prepared in accordance with policy board rules and shall be open for public inspection after the contract is awarded.
- (4) The request for proposals shall state the relative importance of price and other evaluating factors
- (5) (a) As provided in the request for proposals and under policy board rules, discussions may be conducted with responsible offerors who submit proposals for the purpose of assuring full understanding of, and responsiveness to, solicitation requirements.
  - (b) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the contract is awarded for the purpose of obtaining best and final offers.
  - (c) In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.
- (6) (a) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals.
  - (b) No other factors or criteria shall be used in the evaluation.
  - (c) The contract file shall contain the basis on which the award is made.

### 63G-6-408.5. Procurement for submitted proposal.

- (1) As used in this section:
- (a) "Committee" is as defined in Section 63M-1-2602.
- (b) "Initial proposal" is a proposal submitted by a private entity under Section 63M-1-2605.
- (2) After receipt by the chief procurement officer of a copy of an initial proposal from the committee in accordance with Subsection 63M-1-2606(5), including any comment, suggestion, or modification to the initial proposal, the chief

- procurement officer shall initiate a procurement process in compliance with Title 63G, Chapter 6, Utah Procurement Code.
- (3) The chief procurement officer or designee shall:
  - (a) review each detailed proposal received in accordance with Title 63M, Chapter 1, Part 26, Government Procurement Private Proposal Program; and
  - (b) submit all detailed proposals that meet the guidelines established under Subsection 63M-1-2608(1) to the committee for review under Section 63M-1-2609.
- (4) For purposes of this chapter, the Governor's Office of Economic Development is considered the purchasing agency for a procurement process under Title 63M, Chapter 1, Part 26, Government Procurement Private Proposal Program.

Enacted by Chapter 352, 2008 General Session

#### 63G-6-409. Small purchases.

Small purchases shall be defined in, and may be made in accordance with procedures established by, rules and regulations; except that the procurement requirement shall not be artificially divided so as to constitute a small purchase under this section.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-410. Circumstances justifying award of contract without competition.

A contract may be awarded for a supply, service, or construction item without competition when, under rules and regulations, the chief procurement officer, the head of a purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that:

- (1) there is only one source for the required supply, service, or construction item; or
- (2) the award to a specific supplier, service provider, or contractor is a condition of a donation that will fund the full cost of the supply, service, or construction item.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-411. Emergency procurements.

Notwithstanding any other provision of this chapter, when there exists a threat to public health, welfare, or safety under emergency conditions as defined in rules and regulations, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements; provided that emergency procurements shall be made with as much competition as practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the

particular contractor shall be included in the contract file.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-412. Cancellation and rejection of bids.

An invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected, in whole or in part, as may be specified in the solicitation, when it is in the best interests of the state in accordance with rules and regulations. The reasons shall be made part of the contract file.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-413. Determination of nonresponsibility of bidder.

A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with rules and regulations. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to the bidder or offeror. Information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the purchasing division or the purchasing agency without prior written consent by the bidder or offeror. Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-414. Prequalification of suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. Solicitation mailing lists of potential contractors shall include but shall not be limited to prequalified suppliers.

Renumbered and Amended by Chapter 382, 2008 General Session

# 63G-6-415. Rules and regulations to determine allowable incurred costs -- Required information -- Auditing of books.

- (1) Rules and regulations may be promulgated to set forth cost principles to be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs; provided that if a written determination is approved at a level above the procurement officer, the cost principles may be modified by contract.
- (2) A person shall, except as provided in Subsection (4), submit cost or pricing data and shall certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted were accurate, complete, and current as of a mutually determined specified date prior to the date of:
  - (a) the pricing of any contract awarded by competitive sealed proposals or pursuant to the

- sole source procurement authority, where the total contract price is expected to exceed an amount established by rules and regulations; or
- (b) the pricing of any change order which is expected to exceed an amount established by rules and regulations.
- (3) Any contract or change order under which a certificate is required shall contain a provision that the price to the state, including profit or fee, shall be adjusted to exclude any significant sums by which the state finds that the price was increased because the contractor-furnished cost or pricing data were inaccurate, incomplete, or not current as of the date agreed upon between the parties.
- (4) The requirements of Subsections (2) and (3) need not be applied to contracts:
  - (a) where the contract price is based on adequate price competition;
  - (b) where the contract price is based on established catalogue prices or market prices;
  - (c) where contract prices are set by law or regulation; or
  - (d) where it is determined in writing in accordance with rules and regulations that the requirements of this section may be waived, and the reasons for such waiver are stated in writing.
- (5) The state may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to this section or any contractor or subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that the books and records relate to the cost or pricing data, contract, or subcontract. The books and records shall be maintained by the contractor for three years following the end of the fiscal year in which final payment is made under the prime contract and by the subcontractor for three years following the end of the fiscal year in which final payment is made under the subcontract, unless a shorter period is otherwise authorized in writing.

Renumbered and Amended by Chapter 382, 2008 General Session

## 63G-6-416. Cost-plus-a-percentage-of-cost contract prohibited.

(1) Subject to the limitations of this section, any type of contract which will promote the best interests of the state may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

- (2) Except with respect to firm fixed-price contracts, no contract type shall be used unless it has been determined in writing by the chief procurement officer, the head of a purchasing agency, or a designee of either officer that:
  - (a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
  - (b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

### 63G-6-417. Period of time for contract of supplies.

- (1) Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time considered to be in the best interests of the state; provided that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds.
- (2) Prior to the utilization of a multiyear contract, it shall be determined in writing that estimated requirements cover the period of the contract and are reasonably firm and continuing and that such a contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.
- (3) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for that purpose.

  Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-418. Right of state to inspect place of business of contractor or subcontractor.

The state may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the state.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-419. Determinations final except when arbitrary and capricious.

The determinations required by Subsections 63G-6-401(6), 63G-6-408(1) and (6), Sections 63G-6-410, 63G-6-411, 63G-6-413, Subsection 63G-6-415(4), Section 63G-6-416, and Subsection 63G-6-417(2) are final and conclusive unless they are arbitrary and capricious or clearly erroneous.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-420. Factual information to attorney general if collusion suspected.

When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-421. Records of contracts made.

The chief procurement officer or the head of a purchasing agency shall maintain a record listing all contracts made under Section 63G-6-410 or 63G-6-411 and shall maintain the record in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. The record shall contain each contractor's name, the amount and type of each contract, and a listing of the supplies, services, or construction procured under each contract.

Renumbered and Amended by Chapter 382, 2008 General Session

## 63G-6-422. Exemptions from source selection and contract requirements -- Violation penalty.

The policy board may, by rule, exempt a public procurement unit from the source selection and contract award provisions of this part, if it considers that to be in the best economic interest of the state.

On projects where public funds or political subdivisions are involved, the owner shall follow the procedures outlined in the Utah Procurement Code when determining or selecting their agent or construction manager. However, no exemption shall be permitted that allows any political subdivision of this state to negotiate, enter into, or cause to be negotiated prior to open bidding for the prime contracting agent any predetermined agreement or arrangement which causes interference with the traditional fair competitive bidding process or the rights of employees under state and federal law. Any agreement or arrangement entered into in violation of this section is unenforceable and void ab initio and the parties to such an agreement or arrangement are subject to a class B misdemeanor penalty.

This provision shall not apply to any political subdivision, agency, or department of this state, if, as a condition of a federal grant, there is a requirement that a schedule of predetermined wages be included in the contract.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-423. Purchase of prison industry goods.

- (1) All public procurement units shall purchase goods and services produced by the Utah Correctional Industries Division as provided by this section, which is an exemption from this chapter. All political subdivisions of the state may purchase these goods and services and are encouraged to do so when feasible.
- (2) By July 1 of each year, the director of the Utah Correctional Industries shall publish and distribute to all state agencies and interested political subdivisions a catalog of goods and services provided by the Correctional Industries Division. The catalog shall include a description and price of each item offered for sale. The catalog shall be updated and revised during the year as the director considers necessary.
- (3) (a) State departments, agencies, and institutions may not purchase any goods or services provided by the Correctional Industries Division from any other source unless it has been determined in writing by the director of Correctional Industries and the state procurement officer or in the case of institutions of higher education, the institutional procurement officer, that purchase from the Correctional Industries Division is not feasible due to one of the following circumstances:
  - (i) the good or service offered by the division does not meet the reasonable requirements of the purchasing agency;
  - (ii) the good or service cannot be supplied within a reasonable time by the division; or
  - (iii) the cost of the good or service, including basic price, transportation costs, and other expenses of acquisition, is not competitive with the cost of procuring the item from another source.
  - (b) In cases of disagreement, the decision may be appealed to a board consisting of the director of the Department of Corrections, the director of Administrative Services, and a neutral third party agreed upon by the other two members or, in the case of institutions of higher education, the president of the involved institution shall make the final decision.

Renumbered and Amended by Chapter 382, 2008 General Session

# 63G-6-424. Counties and municipalities eligible to participate in state agreements, contracts, and surplus property program.

Utah counties, municipalities, and local public procurement units may purchase from or otherwise participate in state public procurement unit agreements and contracts.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-425. Purchase from community rehabilitation programs.

- (1) As used in this section:
- (a) "Board" means the Purchasing from Persons with Disabilities Advisory Board created under this section.
- (b) "Central not-for-profit association" means a group of experts designated by the board to do the following, under guidelines established by the board:
  - (i) assist the board with its functions; and
  - (ii) facilitate the implementation of board policies.
- (c) (i) "Community rehabilitation program" means a program that is operated primarily for the purpose of the employment and training of persons with a disability by a government agency or qualified nonprofit organization which is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) of the Internal Revenue Code.
  - (ii) A community rehabilitation program:
    - (A) maintains an employment ratio of at least 75% of the program employees under the procurement contract in question have severe disabilities;
    - (B) (I) complies with any applicable occupational health and safety standards prescribed by the United States Department of Labor; or
      - (II) is a supported employment program approved by the Utah State Office of Rehabilitation;
    - (C) has its principal place of business in Utah;
    - (D) produces any good provided under this section in Utah; and
    - (E) provides any service that is provided by individuals with a majority of whom domiciled in Utah.
- (d) "Person with a disability" means a person with any disability as defined by and

- covered under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.
- (2) (a) There is created the Purchasing from Persons with Disabilities Advisory Board within the Division of Purchasing and General Services of the Department of Administrative Services. The board shall be composed of the following three members:
  - (i) the director of the Division of Purchasing and General Services created under Section 63A-2-101 or a designee;
  - (ii) the executive director of the Utah State Office of Rehabilitation created under Section 53A-24-103 or a designee; and
  - (iii) a representative of the private business community who shall be appointed to a three-year term by the governor with the advice and consent of the Senate.
  - (b) The board shall meet, as needed, to facilitate the procurement of goods and services from community rehabilitation programs by a public procurement unit under this chapter by:
    - (i) identifying goods and services that are available from community rehabilitation programs according to the requirements under Subsection (4);
    - (ii) approving prices in accordance with Subsection (4)(c) for goods and services that are identified under Subsection (2)(b)(i);
    - (iii) developing, maintaining, and approving a preferred procurement contract list of goods and services identified and priced under Subsections (2)(b)(i) and (ii);
    - (iv) reviewing bids received by a community rehabilitation program; and
    - (v) awarding and renewing specified contracts for set contract times, without competitive bidding, for the purchase of goods and services under Subsection (4).
  - (c) The provisions of Subsections (2)(b) and (4)(a) are an exception to the procurement provisions under this chapter.
- (3) (a) The board may designate a central notfor-profit association, appoint its members, and establish guidelines for its duties.
  - (b) The designated central not-for-profit association serves at the pleasure of the board and the central not-for-profit association or its individual members may be removed by the board at any time by a majority vote of the board.
  - (c) Subject to the board guidelines and discretion, a designated central not-for-profit association may be assigned to perform the following duties:

- (i) identify qualified community rehabilitation programs and the goods and services that they provide or have the potential to provide;
- (ii) help ensure that goods and services are provided at reasonable quality and delivery levels;
- (iii) recommend pricing for goods and services:
- (iv) reviewing bids and recommending the award of contracts under the board's direction;
- (v) collecting and reporting program data to the board and to the division; and
  - (vi) other duties specified by the board.
- (4) Except as provided under Subsection (6), notwithstanding any provision in this chapter to the contrary, each public procurement unit shall purchase goods and services produced by a community rehabilitation program using the preferred procurement contract list approved under Subsection (2)(b)(iii) if:
  - (a) the good or service offered for sale by a community rehabilitation program reasonably conforms to the needs and specifications of the public procurement unit;
  - (b) the community rehabilitation program can supply the good or service within a reasonable time; and
  - (c) the price of the good or service is reasonably competitive with the cost of procuring the good or service from another source.
  - (5) Each community rehabilitation program:
  - (a) may submit a bid to the board at any time and not necessarily in response to a request for bids; and
  - (b) shall certify on any bid it submits to the board or to a public procurement unit under this section that it is claiming a preference under this section.
- (6) During a fiscal year, the requirement for a public procurement unit to purchase goods and services produced by a community rehabilitation program under the preferred procurement list under Subsection (4) does not apply if the Division of Purchasing and General Services determines that the total amount of procurement contracts with community rehabilitation programs has reached \$5 million for that fiscal year.
- (7) In the case of conflict between a purchase under this section and a purchase under Section 63G-6-423, this section prevails.

## 63G-6-426. Tie bids -- Preference for providers of state products -- Resolution of tie bids -- Record of tie bids.

- (1) As used in this section:
- (a) (i) "Commodity" means a good, product, material, or item, including an agricultural, manufacturing, or mining product;
  - (ii) "Commodity" does not include:
    - (A) a service; or
  - (B) construction materials or services.
- (b) "Provider of state products" means a bidder offering goods, supplies, products, materials, or items that are produced, manufactured, mined, or grown in the state.
- (c) "Tie bid" means a low responsive bid from a responsive bidder that is identical in price to a responsive bid from another responsive bidder.
- (2) In the event of a tie bid for the provision of a commodity where only one of the bidders having the low responsive bid is a provider of state products, a public procurement unit shall award the contract to the provider of state products if:
  - (a) the quality of the commodity offered by the provider of state products is equal to or greater than the quality of the commodity offered by the other tied bidders;
  - (b) the commodity offered by the provider of state products is suitable for the use required by the public procurement unit; and
  - (c) the provider of state products is able to produce the commodity in sufficient quantity.
- (3) Unless Subsection (2) applies, a public procurement unit shall make an award on a tie bid by using one of the following procedures, which shall be selected in the sole discretion of the procurement officer:
  - (a) where a tie bid includes the cost of delivery, awarding the contract to the bidder closest to the point of delivery;
  - (b) awarding the contract to the identical bidder who received the previous award, and continue to award succeeding contracts to the same bidder so long as all low bids are tie bids;
  - (c) awarding the contract to the bidder with the earliest delivery date;
  - (d) if the price of the tie bid is considered excessive or the bids are unsatisfactory for another reason, rejecting all bids and negotiating a more favorable contact on the open market; or
  - (e) if the procurement officer determines in writing that no method under this Subsection (3) will equitably resolve the tie bid, awarding the contract by drawing lots.
  - (4) Awards of tie bids shall not be made by:

- (a) dividing business among tied bidders; or
- (b) drawing lots, except as provided in Subsection (3)(e).
- (5) (a) A state public procurement unit shall retain a record of each invitation for bids on which a tie bid is received, that shall include the following information:
  - (i) the invitation for bids;
  - (ii) the supply, service, or construction item requested by the invitation for bids;
  - (iii) all the bidders and the prices submitted:
  - (iv) the procedure used to resolve the tie bid; and
  - (v) the results of the procedure used to resolve the tie bid, including the name of the bidder awarded the contract.
  - (b) A copy of the record maintained under Subsection (5)(a) shall be provided to the attorney general for all contracts having a tie bid in excess of \$50,000.

Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 5. Procurement of Construction.

### 63G-6-501. Alternative methods of construction contracting management.

- (1) (a) Rules shall provide as many alternative methods of construction contracting management as determined to be feasible.
  - (b) These rules shall:
  - (i) grant to the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project the discretion to select the appropriate method of construction contracting management for a particular project; and
  - (ii) require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.
  - (c) Before choosing a construction contracting management method, the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project shall consider the following factors:
    - (i) when the project must be ready to be occupied;
      - (ii) the type of project;
    - (iii) the extent to which the requirements of the procuring agencies and

the ways in which they are to be met are known;

- (iv) the location of the project;
- (v) the size, scope, complexity, and economics of the project;
- (vi) the source of funding and any resulting constraints necessitated by the funding source;
- (vii) the availability, qualification, and experience of state personnel to be assigned to the project and how much time the state personnel can devote to the project; and
- (viii) the availability, qualifications, and experience of outside consultants and contractors to complete the project under the various methods being considered.
- (2) (a) Rules adopted by state public procurement units and local public procurement units to implement this section may authorize the use of a Construction Manager/General Contractor as one method of construction contracting management.
  - (b) Those rules shall require that:
  - (i) the Construction Manager/General Contractor shall be selected using one of the source selection methods provided for in Part 4, Source Selections and Contract Formation, and Section 63G-6-502; and
  - (ii) when entering into any subcontract that was not specifically included in the Construction Manager/General Contractor's cost proposal submitted under the requirements of Subsection (2)(b)(i), the Construction Manager/General Contractor shall procure that subcontractor by using one of the source selection methods provided for in Part 4, Source Selections and Contract Formation, in the same manner as if the subcontract work was procured directly by the state.
- (3) Procurement rules adopted by the State Building Board under Subsection (1) for state building construction projects may authorize the use of a design-build provider as one method of construction contracting management.

Renumbered and Amended by Chapter 382, 2008 General Session

## 63G-6-502. Procurement of design-build transportation project contracts.

- (1) As used in this section:
- (a) "Design-build transportation project contract" means the procurement of both the design and construction of a transportation project in a single contract with a company or combination of companies capable of providing the necessary engineering services and construction.

- (b) "Transportation agency" means:
  - (i) the Department of Transportation;
- (ii) a county of the first or second class, as defined in Section 17-50-501;
- (iii) a municipality of the first class, as defined in Section 10-2-301;
- (iv) a public transit district that has more than 200,000 people residing within its boundaries; and
  - (v) a public airport authority.
- (2) Except as provided in Subsection (3), a transportation agency may award a design-build transportation project contract for any transportation project that has an estimated cost of at least \$50,000,000 by following the requirements of this section.
  - (3) (a) The Department of Transportation:
    - (i) may award a design-build transportation project contract for any transportation project by following the requirements of this section; and
    - (ii) shall make rules, by following the procedures and requirements of Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing requirements for the procurement of its design-build transportation project contracts in addition to those required by this section.
  - (b) A public transit district that has more than 200,000 people residing within its boundaries:
    - (i) may award a design-build transportation project contract for any transportation project by following the requirements of this section; and
    - (ii) shall pass ordinances or a resolution establishing requirements for the procurement of its design-build transportation project contracts in addition to those required by this section.
  - (c) A design-build transportation project contract authorized under this Subsection (3) is not subject to the estimated cost threshold under Subsection (2).
- (4) (a) Before entering a design-build transportation project contract, a transportation agency may issue a request for qualifications to prequalify potential contractors.
  - (b) Public notice of the request for qualifications shall be given in accordance with policy board rules.
  - (c) A transportation agency shall require, as part of the qualifications specified in the request for qualifications, that potential contractors at least demonstrate their:
    - (i) construction experience;

- (ii) design experience;
- (iii) financial, manpower, and equipment resources available for the project; and
- (iv) experience in other design-build transportation projects with attributes similar to the project being procured.
- (d) The request for qualifications shall identify the number of eligible competing proposers that the transportation agency will select to submit a proposal, which must be at least two.
- (5) (a) The transportation agency shall:
  - (i) evaluate the responses received from the request for qualifications;
  - (ii) select from their number those qualified to submit proposals; and
  - (iii) invite those respondents to submit proposals based upon the transportation agency's request for proposals.
- (b) (i) Except as provided in Subsection (5)(b)(ii), if the transportation agency fails to receive at least two qualified eligible competing proposers, the transportation agency shall readvertise the project.
  - (ii) Until July 1, 2010, a transportation agency may award a contract for a transportation project that has an estimated cost of \$5,000,000 or less to a qualified eligible proposer if:
    - (A) only a single proposal is received; and
    - (B) the transportation agency determines that:
      - (I) the proposal is advantageous to the state; and (II) the proposal price is reasonable.
  - (iii) The Transportation Interim Committee and Government Operations Interim Committee of the Legislature shall review Subsection (5)(b)(ii) prior to November 30, 2009.
- (6) The transportation agency shall issue a request for proposals to those qualified respondents that:
  - (a) includes a scope of work statement constituting an information for proposal that may include:
    - (i) preliminary design concepts;
    - (ii) design criteria, needs, and objectives;
    - (iii) warranty and quality control requirements;
      - (iv) applicable standards;
      - (v) environmental documents;

- (vi) constraints;
- (vii) time expectations or limitations;
- (viii) incentives or disincentives; and
- (ix) other special considerations;
- (b) requires submitters to provide:
  - (i) a sealed cost proposal;
- (ii) a critical path matrix schedule, including cash flow requirements;
  - (iii) proposal security; and
- (iv) other items required by the department for the project; and
- (c) may include award of a stipulated fee to be paid to submitters who submit unsuccessful proposals.
- (7) The transportation agency shall:
- (a) evaluate the submissions received in response to the request for proposals from the prequalified proposers;
- (b) comply with rules relating to discussion of proposals, best and final offers, and evaluations of the proposals submitted; and
- (c) after considering price and other identified factors, award the contract to the responsible proposer whose proposal is most advantageous to the state.

### 63G-6-503. Definitions -- Procurement of tollway development agreements.

- (1) As used in this section:
- (a) "Department" means the Department of Transportation.
- (b) "Tollway development agreement" has the same meaning as defined in Section 72-6-202.
- (2) The department and the Transportation Commission:
  - (a) may solicit a tollway development agreement proposal by following the requirements of this section;
  - (b) may award a solicited tollway development agreement contract for any tollway project by following the requirements of this section; and
  - (c) shall make rules, by following the procedures and requirements of Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing requirements for the procurement of tollway development agreement proposals in addition to those required by this section.
- (3) (a) Before entering into a tollway development agreement, the department may issue a request for qualifications to prequalify potential contractors.

- (b) Public notice of the request for qualifications shall be given in accordance with policy board rules.
- (c) The department shall require, as part of the qualifications specified in the request for qualifications, that potential contractors at least provide:
  - (i) a demonstration of their experience with other transportation concession projects with attributes similar to the project being procured;
  - (ii) a financial statement of the firm or consortium of firms making the proposal;
  - (iii) a conceptual project development plan and financing plan;
  - (iv) the legal structure of the firm or consortium of firms making the proposal;
  - (v) the organizational structure for the project; and
  - (vi) a statement describing why the firm or consortium of firms is best qualified for the project.
- (d) The request for qualifications shall identify the number of eligible competing proposers that the department will select to submit a proposal.
- (4) The department shall:
- (a) evaluate the responses received from the request for qualifications;
- (b) select from their number those qualified to submit proposals; and
- (c) invite those respondents to submit proposals based upon the department's request for proposals.
- (5) The department shall issue a request for proposals to those qualified respondents that may require, as appropriate for the procurement:
  - (a) a description of the proposed project or projects;
  - (b) a financial plan for the project, including:
    - (i) the anticipated financial commitment of all parties;
    - (ii) equity, debt, and other financing mechanisms;
    - (iii) an analysis of the projected return, rate of return, or both; and
    - (iv) the monetary benefit and other value to a government entity;
    - (c) assumptions about user fees or toll rates;
  - (d) a project development and management plan, including:
    - (i) the contracting structure;
    - (ii) the plan for quality management;
    - (iii) the proposed toll enforcement plan; and

- (iv) the plan for safety management; and
- (e) the proposal to comply with the minimum guidelines for tollway development agreement proposals under Section 72-6-204.
- (6) The department and the Transportation Commission:
  - (a) shall evaluate the submissions received in response to the request for proposals from the prequalified proposers;
  - (b) shall comply with rules relating to discussion of proposals, best and final offers, and evaluations of the proposals submitted; and
  - (c) may after considering price and other identified factors and complying with the requirements of Section 72-6-206, award the contract to the responsible proposer whose proposal is most advantageous to the state.

### 63G-6-504. Bid security requirements -- Directed suretyship prohibited -- Penalty.

- (1) Bid security in amount equal to at least 5% of the amount of the bid shall be required for all competitive sealed bidding for construction contracts. Bid security shall be a bond provided by a surety company authorized to do business in this state, the equivalent in cash, or any other form satisfactory to the state.
- (2) When a bidder fails to comply with the requirement for bid security set forth in the invitation for bids, the bid shall be rejected unless, pursuant to rules, it is determined that the failure to comply with the security requirements is nonsubstantial.
- (3) After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, except as provided in Subsection 63G-6-401(6). If a bidder is permitted to withdraw a bid before award, no action shall be taken against the bidder or the bid security.
- (4) (a) When issuing an invitation for a bid under this chapter, the chief procurement officer or the head of the purchasing agency responsible for carrying out a construction project may not require a person or entity who is bidding for a contract to obtain a bond of the type referred to in Subsection (1) from a specific insurance or surety company, producer, agent, or broker.
  - (b) A person who violates Subsection (4)(a) is guilty of an infraction.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-505. Bonds necessary when contract is awarded -- Waiver -- Action -- Attorney fees.

(1) When a construction contract is awarded under this chapter, the contractor to whom the

contract is awarded shall deliver the following bonds or security to the state, which shall become binding on the parties upon the execution of the contract:

- (a) a performance bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and
- (b) a payment bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state, which is for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract.
- (2) (a) When a construction contract is awarded under this chapter, the chief procurement officer or the head of the purchasing agency responsible for carrying out a construction project may not require a contractor to whom a contract is awarded to obtain a bond of the types referred to in Subsection (1) from a specific insurance or surety company, producer, agent, or broker.
  - (b) A person who violates Subsection (2)(a) is guilty of an infraction.
- (3) Rules may provide for waiver of the requirement of a bid, performance, or payment bond for circumstances in which the state considers any or all of the bonds to be unnecessary to protect the state.
- (4) A person shall have a right of action on a payment bond under this section for any unpaid amount due him if:
  - (a) the person has furnished labor, service, equipment, or material for the work provided for in the contract for which the payment bond is furnished under this section; and
  - (b) the person has not been paid in full within 90 days after the last date on which the person performed the labor or service or supplied the equipment or material for which the claim is made.
- (5) An action upon a payment bond shall be brought in a court of competent jurisdiction in any county where the construction contract was to be performed and not elsewhere. The action is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based. The obligee named in the bond need not be joined as a party to the action.
- (6) In any suit upon a payment bond, the court shall award reasonable attorney fees to the prevailing party, which fees shall be taxed as costs in the action.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-506. Preliminary notice requirement.

- (1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the designated agent as prescribed by Section 38-1-32, except that this section does not apply:
  - (a) to a person performing labor for wages; or
  - (b) if a notice of commencement is not filed as prescribed in Section 38-1-31 for the project or improvement for which labor, service, equipment, or material is furnished.
- (2) Any person who fails to provide the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.
- (3) The preliminary notice required by Subsection (1) must be provided prior to commencement of any action on the payment bond. Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-507. Form of bonds -- Effect of certified copy.

The form of the bonds required by this part shall be established by rules and regulations. Any person may obtain from the state a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 6. Contract Clauses.

# 63G-6-601. Required contract clauses -- Computation of price adjustments -- Use of rules and regulations.

- (1) Rules and regulations shall require for state construction contracts and may permit or require for state contracts for supplies and services the inclusion of clauses providing for adjustments in prices, time of performance, or other appropriate contract provisions, and covering the following subjects:
  - (a) the unilateral right of the state to order in writing changes in the work within the scope of the contract and changes in the time of performance of the contract that do not alter the scope of the contract work;
  - (b) variations occurring between estimated quantities of work in a contract and actual quantities;
  - (c) suspension of work ordered by the state; and

- (d) site conditions differing from those indicated in the construction contract, or ordinarily encountered, except that differing site conditions clauses required by the rules and regulations need not be included in a construction contract when the contract is negotiated, when the contractor provides the site or design, or when the parties have otherwise agreed with respect to the risk of differing site conditions.
- (2) Adjustments in price pursuant to clauses promulgated under Subsection (1) shall be computed in one or more of the following ways:
  - (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (b) by unit prices specified in the contract or subsequently agreed upon;
  - (c) by the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
  - (d) in any other manner as the contracting parties may mutually agree; or
  - (e) in the absence of agreement by the parties, by a unilateral determination by the state of the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as computed by the state in accordance with applicable sections of the rules and regulations issued under Subsection 63G-6-415(1) and subject to the provisions of Part 8, Legal and Contractual Remedies.
- (3) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 63G-6-415.
- (4) Rules and regulations shall require for state construction contracts and may permit or require for state contracts for supplies and services the inclusion of clauses providing for appropriate remedies and covering at least the following subjects:
  - (a) liquidated damages as appropriate;
  - (b) specified excuses for delay or nonperformance;
  - (c) termination of the contract for default; and
  - (d) termination of the contract in whole or in part for the convenience of the state.
- (5) The contract clauses promulgated under this section shall be set forth in rules and regulations. However, the chief procurement officer or the head of a purchasing agency may modify the clauses for inclusion in any particular contract. Any variations shall be supported by a written determination that describes the circumstances justifying the variations,

and notice of any material variation shall be included in the invitation for bids or request for proposals. Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-602. Certification of change order.

Under a construction contract, any change order which increases the contract amount shall be subject to prior written certification that the change order is within the determined project or contract budget. The certification shall be made by the fiscal officer of the entity responsible for funding the project or the contract or other official responsible for monitoring and reporting upon the status of the costs of the total project or contract budget. If the certification discloses a resulting increase in the total project or contract budget, the procurement officer shall not execute or make the change order unless sufficient funds are available or the scope of the project or contract is adjusted to permit the degree of completion feasible within the total project or contract budget as it existed prior to the change order under consideration. However, with respect to the validity, as to the contractor, of any executed change order upon which the contractor has reasonably relied, it shall be presumed that there has been compliance with the provisions of this section. Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 7. Architect-engineer Services.

#### 63G-6-701. Policy regarding architectengineer services.

It is the policy of this state to publicly announce all requirements for architect-engineer services and to negotiate contracts for architect-engineer services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices. Architect-engineer services shall be procured as provided in this part except as authorized by Sections 63G-6-409 through 63G-6-411. This part does not affect the authority of, and does not apply to procedures undertaken by, a public procurement unit to obtain the services of architects or engineers in the capacity of employees of such unit.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-702. Selection committee for architectengineer services.

In the procurement of architect-engineer services, the chief procurement officer or the head of a purchasing agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The Building Board shall be the selection committee for architect-engineer services

contracts under its authority. Selection committees for architect-engineer services contracts not under the authority of the Building Board shall be established in accordance with rules and regulations promulgated by the policy board. Selection committees shall evaluate current statements of qualifications and performance data on file with the state, together with those that may be submitted by other firms in response to the announcement of the proposed contract. Selection committees shall consider no less than three firms and then shall select therefrom, based upon criteria established and published by the selection committees, no less than three of the firms considered to be the most highly qualified to provide the services required.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-703. Selection as part of design-build or lease.

Notwithstanding any other provision of this chapter, architect-engineer services may be procured under Title 63A, Chapter 5, State Building Board - Division of Facilities Construction and Management, as part of the services obtained in a design-build contract or as part of the services obtained in a lease contract for real property, provided that the qualifications of those providing the architect-engineer services are part of the consideration in the selection process.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-704. Determination of compensation for architect-engineer services.

The procurement officer shall award a contract to a qualified firm at compensation which the procurement officer determines in writing to be fair and reasonable to the state. In making this decision, the procurement officer shall take into account the estimated value, the scope, and complexity, and the professional nature of the services to be rendered. Should the procurement officer be unable to agree to a satisfactory contract with the firm first selected, at a price the procurement officer determines to be fair and reasonable to the state, discussions with that firm shall be formally terminated. The procurement officer shall then undertake discussions with a second qualified firm. Failing accord with the second firm, the procurement officer shall formally terminate discussions. The procurement officer shall then undertake discussions with a third qualified firm. Should the procurement officer be unable to award a contract at a fair and reasonable price with any of the selected firms, the procurement officer shall select additional firms, and the procurement officer shall continue discussions in accordance with this part until an agreement is reached.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-705. Restrictions on state agency procurement of architect-engineer services.

- (1) Except as provided in Subsection (2), when a public procurement unit, in accordance with Section 63G-6-701, elects to obtain architect or engineering services by using a competitive procurement process and has provided public notice of its competitive procurement process:
  - (a) a higher education entity, or any part of one, may not submit a proposal in response to the public procurement unit's competitive procurement process; and
  - (b) the public procurement unit may not award a contract to perform the architect or engineering services solicited in the competitive procurement process to a higher education entity or any part of one.
- (2) A public procurement unit need not comply with the requirements of Subsection (1) when the public procurement unit is procuring architect or engineer services for contracts related to research activities and technology transfer.

Renumbered and Amended by Chapter 382, 2008 General Session

## Part 8. Legal and Contractual Remedies.

### 63G-6-801. Protest to chief procurement officer -- Time -- Authority to resolve protest.

- (1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency. A protest with respect to an invitation for bids or a request for proposals shall be submitted in writing prior to the opening of bids or the closing date for proposals, unless the aggrieved person did not know and should not have known of the facts giving rise to the protest prior to bid opening or the closing date for proposals. The protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.
- (2) The chief procurement officer, the head of a purchasing agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve the protest.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-802. Effect of timely protest.

In the event of a timely protest under Subsection 63G-6-801(1), 63G-6-810(1), or 63G-6-815(1), the state shall not proceed further with the solicitation or

with the award of the contract until all administrative and judicial remedies have been exhausted or until the chief procurement officer, after consultation with the head of the using agency or the head of a purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state. Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-803. Costs to or against protestor.

- (1) When a protest is sustained administratively or upon administrative or judicial review and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, the protestor shall be entitled to the following relief as a claim against the state:
  - (a) the reasonable costs incurred in connection with the solicitation, including bid preparation and appeal costs; and
  - (b) any equitable relief determined to be appropriate by the reviewing administrative or judicial body.
- (2) When a protest is not sustained by the Procurement Appeals Board, the protestor shall reimburse the Division of Purchasing and General Services for the per diem and expenses paid by the division to witnesses or appeals board members and any additional expenses incurred by the state agency staff who have provided materials and administrative services to the board for that case.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-804. Debarment from consideration for award of contracts -- Causes for debarment.

- (1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the chief procurement officer or the head of a purchasing agency, after consultation with the using agency and the attorney general, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period exceeding three years. The same officer, after consultation with the using agency and the attorney general, shall have authority to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding three months unless an indictment has been issued for an offense which would be a cause for debarment under Subsection (2), in which case the suspension shall, at the request of the attorney general, remain in effect until after the trial of the suspended person.
- (2) The causes for debarment include the following:

- (a) conviction of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract;
- (b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a state contractor;
- (c) conviction under state or federal antitrust statutes;
- (d) failure without good cause to perform in accordance with the terms of the contract; or
- (e) any other cause the chief procurement officer, or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for any cause listed in rules and regulations.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-805. Authority to resolve controversy between state and contractor.

The chief procurement officer, the head of a purchasing agency, or a designee of either officer is authorized, prior to commencement of an action in court concerning the controversy, to settle and resolve a controversy which arises between the state and a contractor under or by virtue of a contract between them. This includes, without limitation, controversies based upon breach of contract, mistakes, misrepresentation, or other cause for contract modification or rescission.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-806. Decisions of chief procurement officer to be in writing -- Effect of no writing.

- (1) The chief procurement officer, the head of a purchasing agency, or the designee of either officer shall promptly issue a written decision regarding any protest, debarment or suspension, or contract controversy if it is not settled by a mutual agreement. The decision shall state the reasons for the action taken and inform the protestor, contractor, or prospective contractor of the right to judicial or administrative review as provided in this chapter.
- (2) A decision shall be effective until stayed or reversed on appeal, except to the extent provided in Section 63G-6-802. A copy of the decision under Subsection (1) shall be mailed or otherwise furnished immediately to the protestor, prospective contractor, or contractor. The decision shall be final and conclusive unless the protestor, prospective

contractor, or contractor appeals administratively to the procurement appeals board in accordance with Subsection 63G-6-810(2) or the protestor, prospective contractor, or contractor commences an action in district court in accordance with Section 63G-6-815.

(3) If the chief procurement officer, the head of a purchasing agency, or the designee of either officer does not issue the written decision regarding a contract controversy within 60 calendar days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-807. Creation of Procurement Appeals Board.

- (1) (a) A Procurement Appeals Board is created in the executive branch. The Procurement Appeals Board shall be composed of a chair and one other member, to be appointed by the governor, and a third member to be designated by the two appointed members on a case-by-case basis.
  - (b) None of the members of the Procurement Appeals Board shall otherwise be full-time employees of the state.
  - (c) The appointed members of the Procurement Appeals Board shall have been members in good standing of the state bar for at least five years and shall be experienced in contract or commercial matters.
  - (d) The designated member shall possess the technical expertise and experience needed for the proper disposition of the factual issues presented by the case.
- (2) (a) Except as required by Subsection (2)(b), as terms of current board members expire, the governor shall appoint each new member or reappointed member to a four-year term.
  - (b) Notwithstanding the requirements of Subsection (2)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every two years.
  - (c) The designated member shall serve for the case on which designated until the final disposition of the case.
  - (d) Appointed members may be reappointed for succeeding terms and may continue to serve after the expiration of their terms until a successor takes office.
  - (e) Qualified persons may be redesignated as members.

- (3) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
- (4) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
  - (b) Members may decline to receive per diem and expenses for their service.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-808. Rules of procedure to be adopted.

The Procurement Appeals Board shall adopt rules of procedure which, to the fullest extent possible, will provide for the expeditious resolution of controversies, including procedures to encourage agreements between the parties to a controversy prior to a hearing. The board may adopt small claims procedures for the resolution of controversies involving claims of less than \$15,000.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-809. Decisions to be in writing.

The Procurement Appeals Board shall issue a decision in writing or take other appropriate action of each appeal submitted. A copy of any decision shall be provided to all parties and the chief procurement officer or the head of a purchasing agency.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-810. Jurisdiction of Procurement Appeals Board.

Unless an action has been initiated previously in district courts for essentially the same cause of action, the board shall have jurisdiction to review and determine de novo:

- (1) any protest of a solicitation or award of a contract addressed to the board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- (2) any appeal by an aggrieved party from a decision rendered or considered to have been rendered pursuant to Section 63G-6-806.

  Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-811. Time limits to file protest or appeal -- Effect of filing.

(1) For a protest under Subsection 63G-6-810(1), the aggrieved person shall file a protest with the board within five working days after the aggrieved person knows or should have known of the facts and circumstances upon which the protest is based; provided, however, that a protest with respect to an invitation for bids or request for proposals shall

be filed prior to the opening of bids or the closing date for proposals unless the aggrieved person did not know and should not have known of the facts giving rise to the protest prior to bid opening or the closing date for proposals.

- (2) For an appeal from a decision regarding a protested solicitation or award, the aggrieved person shall file an appeal within seven calendar days of receipt of a decision rendered or considered to have been rendered pursuant to Section 63G-6-806.
- (3) For an appeal from a decision regarding a debarment, suspension, or contract controversy, the aggrieved person shall file an appeal within 60 calendar days of receipt of a decision rendered or considered to have been rendered pursuant to Section 63G-6-806.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-812. Discontinued appeal with prejudice, except as authorized.

After notice of an appeal has been filed with the Procurement Appeals Board, no party may discontinue the appeal without prejudice, except as authorized by the Procurement Appeals Board.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-813. Factual determination of appeals board final and conclusive.

- (1) On any protest or appeal under Section 63G-6-810, the Procurement Appeals Board shall promptly decide the contract controversy or whether the solicitation or award was in accordance with this chapter. Any prior determinations by administrative officials regarding protests of solicitations or awards, suspension or debarments, contract controversies, or breach of contract controversies shall not be final or conclusive.
- (2) A determination of an issue of fact by the Procurement Appeals Board under Subsection (1) shall be final and conclusive unless arbitrary and capricious or clearly erroneous. No determination on an issue of law shall be final or conclusive.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-814. Right to appeal to Court of Appeals.

Any person receiving an adverse decision or the state may appeal a decision of the Procurement Appeals Board to the Court of Appeals. However, no appeal may be made by the state unless recommended by the chief procurement officer or the head of the purchasing agency involved, and approved by the attorney general.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-815. Jurisdiction of district court.

- (1) The district court shall have jurisdiction over an action, whether the action is at law or in equity, between the state and:
  - (a) a bidder, offeror, or contractor, prospective or actual, who is aggrieved in connection with the solicitation or award of a contract:
  - (b) a person who is subject to a suspension or debarment proceeding; and
  - (c) a contractor, for any cause of action which arises under, or by virtue of a contract.
- (2) The provisions of Title 63G, Chapter 7, Part 4, Notice of Claim Against a Governmental Entity or a Government Employee, and Section 63G-7-601 do not apply to actions brought under this chapter by an aggrieved party for equitable relief or reasonable costs incurred in preparing or appealing an unsuccessful bid or offer.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-816. Effect of prior determination by agents of state.

In any judicial action under Section 63G-6-815, determinations by employees, agents, or other persons appointed by the state shall be final and conclusive only as provided in Sections 63G-6-419 and 63G-6-806, and Subsection 63G-6-813(2).

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-817. Statutes of limitations.

- (1) Any action under Subsection 63G-6-815(1)(a) shall be initiated as follows:
  - (a) within 20 calendar days after the aggrieved person knows or should have known of the facts giving rise to the action; provided, however, that an action with respect to an invitation for bids or request for proposals shall be initiated prior to the opening of bids or the closing date for proposals unless the aggrieved person did not know and should not have known of the facts giving rise to the action prior to bid opening or the closing date for proposals; or
  - (b) within 14 calendar days after receipt of a final administrative decision pursuant to either Section 63G-6-806 or Section 63G-6-813, whichever is applicable.
- (2) Any action under Subsection 63G-6-815(1)(b) shall be commenced within six months after receipt of a final administrative decision pursuant to Section 63G-6-806 or Section 63G-6-813, whichever is applicable.
- (3) The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Subsection 63G-6-815(1)(c), except

notice of appeals from the Procurement Appeals Board pursuant to Section 63G-6-814 concerning actions on a contract or for breach of contract shall be filed within one year after the date of the Procurement Appeals Board decision.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-818. Effect of violation prior to award of contract.

If prior to award it is determined administratively or upon administrative or judicial review that a solicitation or proposed award of a contract is in violation of law, the solicitation or proposed award shall be cancelled or revised to comply with the law. Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-819. Effect of violation after award of contract.

If after an award it is determined administratively or upon administrative or judicial review that a solicitation or award of a contract is in violation of law:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
  - (a) The contract may be ratified and affirmed if it is determined that doing so is in the best interests of the state; or
  - (b) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract prior to termination, plus a reasonable profit;
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
  - (a) The contract may be declared null and void: or
  - (b) The contract may be ratified and affirmed if such action is in the best interests of the state, without prejudice to the state's rights to any appropriate damages.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-820. Interest rate.

- (1) Except as provided in Subsection (2), in controversies between the state and contractors under this part, interest on amounts ultimately determined to be due to a contractor or to the state are payable at the rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.
- (2) This section does not apply to public assistance benefits programs.

Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 9. Intergovernmental Relations.

### 63G-6-901. Agreements between public procurement units.

Under the terms agreed upon among the parties, any public procurement unit may enter into agreements with one or more other public procurement units to:

- (1) sponsor, conduct, or administer a cooperative agreement for the procurement or disposal of any supplies, services, or construction;
  - (2) cooperatively use supplies or services;
- (3) commonly use or share warehousing facilities, capital equipment, and other facilities;
- (4) provide personnel; provided that the requesting public procurement unit shall pay the public procurement unit providing the personnel the direct and indirect cost of providing the personnel, in accordance with the agreement; or
- (5) make available informational, technical, and other services, provided that the requirements of the public procurement unit tendering the services shall have precedence over the requesting public procurement unit and that the requesting public procurement unit shall pay for the expenses of the services so provided, in accordance with the agreement.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-902. Services between public procurement units.

- (1) Upon request, any public procurement unit may make available to other public procurement units the following services, among others: standard forms; printed manuals; qualified products lists; source information; common use commodities listings; supplier prequalification information; supplier performance ratings; debarred and suspended bidders lists; forms for invitation for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and contracts or published summaries thereof, including price and time of delivery information.
- (2) Any public procurement unit may provide the following technical services, among others, to other public procurement units; development of specifications; development of quality assurance test methods, including receiving, inspection, and acceptance procedures; use of testing and inspection facilities; and use of personnel training programs.
- (3) Public procurement units may enter into contractual arrangements and publish a schedule of fees for the services provided under Subsections (1) and (2).

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-903. Payments between public procurement units.

All payments from any public procurement unit received by a public procurement unit supplying personnel or services shall be available to the supplying public procurement unit.

Renumbered and Amended by Chapter 382, 2008 General Session

# 63G-6-904. Compliance by one public procurement unit pursuant to agreement considered compliance by others to agreement.

Where the public procurement unit administering a cooperative purchase complies with the requirements of this chapter, any public procurement unit participating in such a purchase shall be considered to have complied with this chapter. Public procurement units may not enter into a cooperative purchasing agreement for the purpose of circumventing this chapter.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-905. Chief procurement officer to collect information as to supplies, etc.

To the extent possible, the chief procurement officer may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by state public procurement units and local public procurement units. The chief procurement officer may make the information available to any public procurement unit upon request.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-906. Resolving controversy arising under a cooperative purchasing agreement.

Under a cooperative purchasing agreement, controversies arising between an administering state public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with Part 8, Legal and Contractual Remedies.

Renumbered and Amended by Chapter 382, 2008 General Session

### 63G-6-907. Resolution of local public procurement controversies.

Any local public procurement unit is authorized to enter into an agreement with the State Procurement Appeals Board to resolve controversies between the local public procurement unit and its contractors, whether or not such controversy arose from a cooperative purchasing agreement.

Renumbered and Amended by Chapter 382, 2008 General Session

#### Part 10. Illegal Activities.

#### 63G-6-1001. Felony to accept emolument.

Any person acting as a procurement officer for the state of Utah or any subdivision thereof, or who in any official capacity participates in the procurement of any supplies, services, construction, real property, or insurance for any such political units, is guilty of a felony if the person asks, receives, or offers to receive any emolument, gratuity, contribution, loan, or reward, or any promise thereof, either for the person's own use or the use or benefit of any other person or organization from any person interested in the sale of such supplies, services, construction, real property, or insurance.

Renumbered and Amended by Chapter 382, 2008 General Session

#### 63G-6-1002. Felony to offer emolument.

A person who is interested in any way in the sale of any supplies, services, construction, real property, or insurance to the state of Utah or any political subdivision thereof, is guilty of a felony if the person gives or offers to give any emolument, gratuity, contribution, loan or reward, or any promise thereof to any person acting as a procurement officer, or who in any official capacity participates in the procurement of such supplies, services, construction, real property, or insurance, whether it is given for the person's own use or for the use or benefit of any other person or organization.

Renumbered and Amended by Chapter 382, 2008 General Session

### Title 63I. Oversight.

## Chapter 4. Privatization Policy Board Act.

#### Part 1. General Provisions.

#### 63I-4-101. Title.

This chapter is known as the "Privatization Policy Board Act."

Enacted by Chapter 147, 2008 General Session

#### 63I-4-102. Definitions.

- (1) (a) "Activity" means to provide a good or service.
  - (b) "Activity" includes to:
    - (i) manufacture a good or service;
    - (ii) process a good or service;
    - (iii) sell a good or service;
    - (iv) offer for sale a good or service;

- (v) rent a good or service;
- (vi) lease a good or service;
- (vii) deliver a good or service;
- (viii) distribute a good or service; or
- (ix) advertise a good or service.
- (2) (a) Except as provided in Subsection (2)(b), "agency" means:
  - (i) the state; or
  - (ii) an entity of the state including a department, office, division, authority, commission, or board.
  - (b) "Agency" does not include:
    - (i) the Legislature;
  - (ii) an entity or agency of the Legislature;
    - (iii) the state auditor;
    - (iv) the state treasurer;
    - (v) the Office of the Attorney General;
  - (vi) the Dairy Commission created in Title 4, Chapter 22, Dairy Promotion Act;
  - (vii) the Heber Valley Railroad Authority created in Title 9, Chapter 3, Part 3, Heber Valley Historic Railroad Authority;
  - (viii) the Utah Science Center Authority created in Title 9, Chapter 3, Part 4, Utah Science Center Authority;
  - (ix) the Utah Housing Corporation created in Title 9, Chapter 4, Part 9, Utah Housing Corporation Act;
  - (x) the Utah State Fair Corporation created in Title 9, Chapter 4, Part 11, Utah State Fair Corporation Act;
  - (xi) the Workers' Compensation Fund created in Title 31A, Chapter 33, Workers' Compensation Fund;
  - (xii) the Utah State Retirement Office created in Title 49, Chapter 11, Utah State Retirement Systems Administration;
  - (xiii) the School and Institutional Trust Lands Administration created in Title 53C, Chapter 1, Part 2, School and Institutional Trust Lands Administration:
  - (xiv) the Utah Communications Agency Network created in Title 63C, Chapter 7, Utah Communications Agency Network Act;
  - (xv) the Utah Capital Investment Corporation created in Title 63M, Chapter 1, Part 12, Utah Venture Capital Enhancement Act;
  - (xvi) an institution of higher education as defined in Section 53B-3-102;
  - (xvii) a school established under Title 53A, Chapter 25, Schools for the Deaf and Blind; or

- (xviii) a charter school chartered by the State Charter School Board under Title 53A, Chapter 1a, Part 5, The Utah Charter Schools Act.
- (3) "Agency head" means the chief administrative officer of an agency.
- (4) "Board" means the Privatization Policy Board created in Section 63I-4-201.
- (5) "Commercial activity" means to engage in an activity that can be obtained in whole or in part from a private enterprise.
  - (6) "Local entity" means:
  - (a) a political subdivision of the state, including a:
    - (i) county;
    - (ii) city;
    - (iii) town;
    - (iv) local school district;
    - (v) local district; or
    - (vi) special service district;
  - (b) an agency of an entity described in this Subsection (6), including a department, office, division, authority, commission, or board; and
  - (c) an entity created by an interlocal cooperative agreement under Title 11, Chapter 13, Interlocal Cooperation Act, between two or more entities described in this Subsection (6).
- (7) "Private enterprise" means a person that for profit:
  - (a) manufactures a good or service;
  - (b) processes a good or service;
  - (c) sells a good or service;
  - (d) offers for sale a good or service;
  - (e) rents a good or service;
  - (f) leases a good or service;
  - (g) delivers a good or service:
  - (h) distributes a good or service; or
  - (i) advertises a good or service.
- (8) "Privatize" means that an activity engaged in by an agency is transferred so that a private enterprise engages in the activity including a transfer by:
  - (a) contract;
  - (b) transfer of property; or
  - (c) another arrangement.

#### Part 2. Privatization Policy Board.

## 63I-4-201. Privatization Policy Board -- Created -- Membership -- Operations -- Expenses.

- (1) (a) There is created a Privatization Policy Board composed of 17 members.
  - (b) The governor shall appoint board members as follows:

- (i) two senators, one each from the majority and minority political parties, from names recommended by the president of the Senate;
- (ii) two representatives, one each from the majority and minority political parties, from names recommended by the speaker of the House of Representatives;
- (iii) two members representing public employees, from names recommended by the largest public employees' association;
- (iv) one member from state management;
- (v) eight members from the private business community;
- (vi) one member representing the Utah League of Cities and Towns from names recommended by the Utah League of Cities and Towns; and
- (vii) one member representing the Utah Association of Counties from names recommended by the Utah Association of Counties.
- (2) (a) Except as required by Subsection (2)(b), a board member:
  - (i) appointed under Subsection (1)(b)(i) or (ii) shall serve a two-year term; and
  - (ii) appointed under Subsections (1)(b)(iii) through (vii) shall serve a four-year term.
  - (b) Notwithstanding the requirements of Subsection (2)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every two years.
  - (c) The governor shall on or before July 1, 2008 change the appointments to the board to reflect the membership requirements of Subsection (1)(b).
- (3) (a) A board member shall hold office until the board member's successor is appointed and qualified.
  - (b) When a vacancy occurs in the membership for any reason, a replacement shall be appointed for the unexpired term.
  - (c) Nine members of the board constitute a quorum.
  - (d) The vote of a majority of board members voting when a quorum is present is necessary for the board to act.
- (4) (a) The board shall select one of the members to serve as chair of the board.
  - (b) A chair shall serve as chair for a term of one-year, and may be selected as chair for more than one term.

- (5) The chief procurement officer or the chief procurement officer's designee shall staff the board.
  - (6) The board shall meet:
    - (a) at least quarterly; and
  - (b) as necessary to conduct its business, as called by the chair.
- (7) (a) (i) A member who is not a government employee may not receive compensation or benefits for the member's services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
  - (ii) A member who is not a government employee may decline to receive per diem and expenses for the member's service.
  - (b) (i) A state government officer and employee member who does not receive salary, per diem, or expenses from the member's agency for the member's service may receive per diem and expenses incurred in the performance of the member's official duties from the board at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
    - (ii) A government officer and employee member may decline to receive per diem and expenses for the member's service.
  - (c) (i) A local government member who does not receive salary, per diem, or expenses from the entity that the member represents for the member's service may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
    - (ii) A local government member may decline to receive per diem and expenses for the member's service.
  - (d) Legislators on the board shall receive compensation and expenses as provided by law and legislative rule.

### 63I-4-202. Privatization Policy Board -- Duties.

- (1) The board shall:
- (a) review whether or not a good or service provided by an agency could be privatized to provide the same types and quality of a good or service that would result in cost savings;
- (b) review privatization of a good or service at the request of:
  - (i) an agency; or
  - (ii) a private enterprise;

- (c) review issues concerning agency competition with one or more private enterprises to determine:
  - (i) whether privatization:
    - (A) would be feasible;
  - (B) would result in cost savings; and
  - (C) would result in equal or better quality of a good or service; and
  - (ii) ways to eliminate any unfair competition with a private enterprise;
- (d) recommend privatization to an agency if a proposed privatization is demonstrated to provide a more cost efficient and effective manner of providing a good or service;
- (e) comply with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, in making rules establishing privatization standards, procedures, and requirements;
- (f) maintain communication with and access information from, other entities promoting privatization;
- (g) comply with Part 3, Commercial Activities Inventory and Review; and
- (h) (i) prepare an annual report for each calendar year that contains:
  - (A) information about the board's activities:
  - (B) recommendations on privatizing a good or service provided by an agency; and
  - (C) the status of the inventory created under Part 3, Commercial Activities Inventory and Review;
  - (ii) submit the annual report to the Legislature and the governor by no later than January 15 immediately following the calendar year for which the report is made; and
  - (iii) provide each interim an oral report to the Government Operations Interim Committee.
- (2) In addition to filing a copy of recommendations for privatization with an agency head, the board shall file a copy of its recommendations for privatization with:
  - (a) the governor's office; and
  - (b) the Office of Legislative Fiscal Analyst for submission to the relevant legislative appropriation subcommittee.
- (3) (a) The board may appoint advisory groups to conduct studies, research, or analyses, and make reports and recommendations with respect to a matter within the jurisdiction of the board.
  - (b) At least one member of the board shall serve on each advisory group.

- (4) (a) Subject to Subsection (4)(b), this chapter does not preclude an agency from privatizing the provision of a good or service independent of the board.
  - (b) If an agency privatizes the provision of a good or service, the agency shall include as part of the contract that privatizes the provision of the good or service that any contractor assumes all liability to provide the good or service
- (5) The board may review upon the request of a local entity a matter relevant to:
  - (a) (i) privatization; or
  - (ii) unfair competition with one or more private enterprises; and
  - (b) an activity or proposed activity of the local entity.

#### 63I-4-203. Board accounting method.

The board by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall establish an accounting method that:

- (1) is similar to generally accepted accounting principles used by a private enterprise;
- (2) allows an agency to identify the total actual cost of engaging in a commercial activity in a manner similar to how a private enterprise identifies the total actual cost to the private enterprise, including the following:
  - (a) a labor expense, such as:
    - (i) compensation and benefits;
    - (ii) a cost of training;
    - (iii) a cost of paying overtime;
    - (iv) a cost of supervising labor; or
    - (v) another personnel expense;
  - (b) an operating cost, such as:
    - (i) vehicle maintenance and repair;
  - (ii) a marketing, advertising, or other sales expense;
    - (iii) an office expense;
  - (iv) a cost of an accounting operation, such as billing;
    - (v) an insurance expense;
    - (vi) a real estate or equipment cost;
    - (vii) a debt service cost; or
  - (viii) a proportionate amount of other overhead or of a capital expense, such as vehicle depreciation and depreciation of other fixed assets;
  - (c) a contract management cost; and
  - (d) another cost particular to a person supplying the good or service; and
- (3) provides a process to estimate the taxes an agency would pay related to engaging in a commercial activity if the agency were required to

pay federal, state, and local taxes to the same extent as a private enterprise engaging in the commercial activity.

Enacted by Chapter 147, 2008 General Session

### Part 3. Commercial Activities Inventory and Review.

#### 63I-4-301. Board to create inventory.

- (1) By no later than June 30, 2009, the board shall create an inventory of activities of the agencies in this state to classify whether each activity is:
  - (a) a commercial activity; or
  - (b) an inherently governmental activity.
- (2) The board shall update the inventory created under this section at least every two years.
- (3) The board shall make the inventory available to the public through electronic means.

Enacted by Chapter 147, 2008 General Session

### 63I-4-302. Governor to require review of commercial activities.

Beginning with fiscal year 2009-10, the governor shall at least once every two fiscal years:

- (1) select at least three commercial activities that are being performed by an agency for examination; and
- (2) require the Governor's Office of Planning and Budget to conduct the examination.

Enacted by Chapter 147, 2008 General Session

### 63I-4-303. Duties of the Governor's Office of Planning and Budget.

- (1) The Governor's Office of Planning and Budget shall:
  - (a) determine the amount of an appropriation that is no longer needed by an executive branch agency because all or a portion of the agency's provision of a good or service is privatized; and
  - (b) adjust the governor's budget recommendations to reflect the amount determined under Subsection (1)(a).
- (2) The Governor's Office of Planning and Budget shall report its findings to the Legislature.
- (3) This section does not prevent the governor from recommending in a budget recommendation the restoration of a portion of the appropriation to an agency that is reduced under this section.

Enacted by Chapter 147, 2008 General Session

#### 63I-4-304. Government immunity.

(1) This chapter or the inclusion of an activity on an inventory made under this chapter may not be construed as a waiver of any right, claim, or defense of immunity that an agency may have under Title

- 63G, Chapter 7, Governmental Immunity Act of Utah, or other law.
- (2) The inclusion in an inventory of an activity as a commercial activity for purposes of this chapter may not be construed to find that the activity does not constitute an exercise of a governmental function.

  Enacted by Chapter 147, 2008 General Session